94

(3)

App. No. 07-1195

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

C. LYNN MOSES
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Blake S. Atkin*
William O. Kimball
Joseph H. Pugsley
ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Attorneys for Petitioner C. LYNN MOSES
*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

ARGUMENT.....1

I. AT THE TIME MOSES CREATED THE FLOOD CONTROL CHANNEL IN QUESTION THE CORPS HAD NOT ASSERTED JURISDICTION OVER THIS AREA.....2

II. THE PETITIONER'S PERIODIC MAINTENANCE OF A FLOOD CHANNEL DID NOT RESULT IN THE DISCHARGE OF APOLLUTANT INTO THE WATERS OF THE UNITED STATES.....3

III. THE GOVERNMENT ACKNOWLEDGES THE SPLIT AMONG THE CIRCUITS IN APPLYING THE *RAPANOS* DECISION.....8

CONCLUSION.....8

APPENDIX.....1a

TABLE OF AUTHORITIES

CASES:

Rapanos v. United States
126 S.Ct. 2208 (U.S. 2006)..... 6, 8

STATUTES AND REGULATIONS:

33 U.S.C. § 1251..... 6

ARGUMENT

The Government continues to misstate the facts in this case in an attempt to establish Clean Water Act jurisdiction where none should exist. The Government would have this Court construe the Clean Water Act so broadly as to undermine the intent of the legislation in the first place; to protect the waters of the United States from chemical and other biological pollutants. Instead of enforcing the Clean Water Act against those who are actually polluting the waters of the United States, the Government seems intent on construing this legislation so broadly as to ultimately include every kayaker or fly fisher who wades into a stream and accidentally dislodges some rocks on the bank of a river. The Clean Water Act clearly has limits on its application and the Court now has an opportunity to reign in the enforcement of the Clean Water Act to meet the purposes for which it was passed.

By presenting such an inaccurate picture of the facts in this case, the Government is attempting to distract the Court from a case that presents this Court with an opportunity to not only provide the circuits with clear direction regarding the application of the Clean Water Act, but also to right a wrong that has been effectuated through the conviction of Mr. C. Lynn Moses.

I. AT THE TIME MOSES CREATED THE FLOOD CONTROL CHANNEL IN QUESTION THE CORPS HAD NOT ASSERTED JURISDICTION OVER THIS AREA.

The Government seems to have directed at Mr. Moses' feet responsibility for all that has happened in the subject area for the past 150 years. Since our Constitution forbids Bills of Attainder, that hardly seems fair.

In order to be fair, the impact and activities in this area need to be viewed as at least three major events. First is the irrigation diversion that completely dewaters this area and turned what had been a year round stream into a flood control channel used only for the disposition of flood waters that the diversion canals are insufficient to handle. This is not an intermittent stream that ebbs and flows with the natural happenstance of precipitation. Rather it is a flood control device employed only when the farmers who own the water do not use it for irrigation.

The second major event in this area was the development activities undertaken in the early 1980's when the city of Driggs was flooded by waters turned loose from the irrigation diversion and the citizens of the area demanded something be done. When Mr. Moses undertook to convert this flood control area from essentially a flood plain to a flood channel that could control the waters and divert them to the county's culvert and prevent flooding of the city, the Corps made it plain that to be in their

jurisdiction they would need to perform studies to determine the significance of the area to the Nations waterways.

The final events to be examined are the actions of Mr. Moses for which he was indicted. Contrary to the assertions by the Government, Mr. Moses was not indicted for dewatering this area through the irrigation diversion 100 years ago. Mr. Moses was not indicted for changing the area from a flood plain to a flood channel in the early 1980s when the Corp had not asserted jurisdiction. Mr. Moses was indicted for doing maintenance work on the channel that had been created in the early 1980s. The Government's expert testified that the work performed by Mr. Moses during the indictment years was necessitated by the work performed in the early 1980s. (*See* Pet. Reply App., *Infra*, pp. 3a-4a).

Mr. Moses simply cleared debris out of the flood channel.

II. THE PETITIONER'S PERIODIC MAINTENANCE OF A FLOOD CHANNEL DID NOT RESULT IN THE DISCHARGE OF A POLLUTANT INTO THE WATERS OF THE UNITED STATES.

None of the gravel disturbed during the maintenance operations performed by Mr. Moses ever migrated to any navigable water of the United States. The Court of Appeals erroneously stated that the gravel migrated into the Teton River, *see* Pet. App., p. 16a. There was no evidence to support this

conclusion by the Court of Appeals. *See* Pet. App., p. 51a-53a:

> Now, there are areas downstream that have problems. There is no question about that. But those problems are – in large part are this natural eluvial fan deposit working because as you start down through the area – and the area right where I'm drawing a mark which is kind of a curve, the grading at that point is 95.8 feet per mile; in other words, in one mile the stream drops 95.8 feet in this little region there.
>
> At the area below the bridge, it gets down below 40. By the time it gets to the Teton River it's six feet per mile. So 95 here, 6 down at the river. And the river down near the confluence between the Teton River and the Teton Creek is totally different. Now, there's no way of showing you the picture. But downstream below an area just off this map the stream is a nice meander. There's no gravel showing. It goes into the Teton River cleanly without any piles of gravel or anything there.
>
> So what happens is that somewhere between Mr. Moses's property, which is right here, and downstream of the highway, which is just off this map, the gravels from

> anywhere have to stop. So the sand, the gravels, the materials that you saw in most of those photographs are course, heavy graded materials. They're not clay. You can see the rocks. They're big. And so that material has to drop somewhere in this vicinity below this point where it's 95 feet per mile down to an area down where it's about 20 feet per mile, which is below the highway that goes north, south into Driggs, and it's just off this map. You can see Driggs is here. It's just off the edge.

None of the sand, gravel or other alleged discharge ever made it into the Teton River. Not only did none of the sand, gravel or other alleged discharge materials ever make it into the Teton River, the evidence at trial showed that Mr. Moses actually removed material from the flood channel. There is no evidence of him putting materials into the flood channel.

The evidence at trial was that Mr. Moses removed sand and gravel from the flood channel, not that he deposited anything new into the channel. *See* Pet. App., p. 53a-54a:

> Q: What effect has the activity in his area had on those downstream people – his activity – the activity in his area?
> A: Well, what happens is because Mr. Moses was taking gravel out, which is clearly understandable, that he has

> actually saved – by taking gravel out of this area, he saved that gravel from going downstream, in large part.

See Pet. Reply App., *Infra*, p. 1a:

> Q: And you don't disagree or dispute the fact that the work that you did did cause discharges in Teton Creek?
> A: We moved the existing gravels and sands in the creek to different locations there. We did not haul anything in and put in. All the things that we did in the creek were either trees that were already there or adjacent and moved the gravels around in the stream channel to make a passable flood channel.

Clearly, contrary to what the government is attempting to establish, Mr. Moses did not deposit any material into Teton Creek.

In order to assert jurisdiction, under Rapanos v. United States, 126 S.Ct. 2208 (U.S. 2006), the EPA must determine that a particular activity or feature has a significant nexus to the purpose of the Clean Water Act, which purpose is to preserve the physical, chemical, and biological integrity of the Nations navigable waters. 33 U.S.C § 1251, (Pet. App., p. 38a). This determination is, of course, required by the Kennedy concurrence in Rapanos.

Mr. Moses' simple maintenance of the channel had no impact on the physical integrity of a navigable water of the United States.

In addition, Mr. Moses' activities were all in uplands; no wetlands were located in the area. *See* Pet. App., p. 45a:

> THE COURT: No. I understand your position. Again, just so we're clear, Mr. Breitsameter, the Government is willing to stipulate that there was no discharge into any wetlands arising out of this case; correct?
> MR. BREITSAMETER: That's correct, Your Honor.

Likewise, there is no suggestion that Mr. Moses introduced any chemical or biological agent whatsoever into the area. Even the minimal trees that were used to repair existing log jams were trees washed down with the latest flood. Thus, there can be no argument that his actions affected the chemical or biological integrity of a navigable water of the United States.

The conflict between the Ninth Circuit decision in this case and other appellate court decisions as well as the wholesale failure of the Ninth Circuit to address the issues pursuant to the Agencies' own criteria, create the type of embarrassing situation that calls for a Writ of Certiorari and which has a substantial chance of resulting in a significant modification of the outcome in this case.

III. THE GOVERNMENT ACKNOWLEDGES THE SPLIT AMONG THE CIRCUITS IN APPLYING THE *RAPANOS* DECISION.

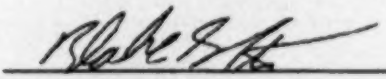
The Government, in footnote 4 of their Brief in Oppositon to this Petition for a Writ of Certiorari, acknowledges the split among several Circuit Courts on this matter of applying the Rapanos decision and the need for clarification of these issues by this Court. This case presents an opportunity to provide the clarification that is so clearly needed in this area of the law.

CONCLUSION

The Governments attempt to misrepresent the facts of this case should not be allowed to effect this Court's opportunity to address an issue that desperately needs clarification by this Court. For the above stated reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 30th day of May, 2008.

ATKIN LAW OFFICES, P.C.



Blake S. Atkin
ATKIN LAW OFFICES, P.C.
Attorney for C. LYNN MOSES

APPENDIX

E.R. 145

Teton Creek crosses from the Wyoming into the Idaho -- you're aware it's an interstate water body; isn't that also true?

A: Yeah, I realize it starts in Wyoming and it crosses Idaho line.

Q: And you don't disagree or dispute the fact that the work that you did did cause discharges in Teton Creek?

A: We moved the existing gravels and sands in the creek to different locations there. We did not haul anything in and put in. All the things that we did in the creek were either trees that were already there or adjacent and moved the gravels around in the stream channel to make a passable flood channel.

Q: You didn't fall trees to create barriers for logjams?

A: Pardon?

Q: You didn't fall any trees to create logjam barriers?

A: There were some dried trees that were

about to fall down that we used that were close by,
but 99 percent of them were trees that we inherited
that washed down the creek from upstream and we just
moved them where they would be beneficial rather than

E.R. 221

your view?
A: I believe so, yes, sir.
Q: Were there any beneficial of the work that you saw?
A: Yes, sir.
Q: What were the beneficial effects?
A: It prevented the homes from being flooded in the subdivision.
Q: How many homes are there?
A: The Aspens, I don't know the exact number, but there is at least eight or nine at the existing. There are new ones being built as we speak, sir.
Q: Would this kind of quality work preven them from being flooded, as well, in a runoff year?
A: If it is was repeated every year, sir, it would be necessary to prevent them from being flooded
Q: The work would have to -- its necessity to have it repeated?
A: Yes, sir.
Q: Because the gravel, as Mr. Hatch -- or Mr. Tupper, I can't remember which, testified that it comes down. Is that your understanding?

23 Yes, sir.
24 Q: So each year there is significant deposits of
25 gravel?